

**Nursing and Midwifery Council
Fitness to Practise Committee**

**Substantive Hearing
Friday 27 August 2021 and Friday 17 December 2021**

Nursing and Midwifery Council
2 Stratford Place, Montfichet Road, London, E20 1EJ

Name of registrant: Michael Andaya

NMC PIN: 16J01200

Part(s) of the register: Registered Nurse sub part 1–
RN1: Adult nurse level 1 (October 2016)

Area of registered address: Harrow

Type of case: Conviction

Panel members: Raymond Marley (Chair, lay member – 27 August 2021)
Suzy Ashworth (Chair, lay member – 17 December 2021)
Claire Clarke (Registrant member)
Claire Corrigan (Lay member)

Legal Assessor: John Donnelly

Panel Secretary: Tyrena Agyemang (27 August 2021)
Sharmilla Nanan (17 December 2021)

Nursing and Midwifery Council: Represented by Ruth Alabaster, Case Presenter

Mr Andaya: On 27 August 2021, present and unrepresented
On 17 December 2021, not present and unrepresented

Facts proved by admission: All

Fitness to practise: Impaired

Sanction: Striking off order

Interim order: Interim Suspension Order (18 months)

Details of charge

That you being a registered nurse:

Were convicted on the 2nd September 2020 at Hendon Magistrates Court of the following offences, namely

1. Between the 1st October 2019 and the 19th November 2019, at St Marks Hospital, London stole pharmaceutical controlled drugs Midazolam and Fentanyl to the value of £3,534 belonging to the NHS contrary to s. 1 (1) and s. 7 of the Theft Act 1968 and
2. Between the 1st October 2019 and the 19th November 2019, at St Marks Hospital London, committed fraud in that, while occupying a position, namely a Registered nurse in which you were expected to safeguard or not to act against the financial interests of the NHS, England dishonestly abused that position intending thereby to make a gain, namely pharmaceutical controlled drugs Fentanyl and Midazolam and cause loss to the NHS England contrary to s. 1 and 4 of the Fraud Act 2006.

And in the light of the above, your fitness to practise is impaired by virtue of your convictions.

Decision and reasons on application for hearing to be held in private

Ms Alabaster, on behalf of the Nursing and Midwifery Council (NMC), made a request that this case be held partially in private on the basis that proper exploration of your case involves references to your health. The application was made pursuant to Rule 19 of 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

You made no comment in relation to this application.

The legal assessor reminded the panel that while Rule 19(1) provides, as a starting point, that hearings shall be conducted in public, Rule 19(3) states that the panel may hold hearings partly or wholly in private if it is satisfied that this is justified by the interests of any party or by the public interest.

Having heard that there will be references to your health, the panel determined to hold such parts of the hearing in private.

Decision and reasons on facts

At the outset of the hearing, you informed the panel that you have made full admissions to all the charges.

The charges concern your conviction and, having been provided with a copy of the certificate of conviction, the panel finds that the facts are found proved in accordance with Rule 31 (2) and (3).

The panel also heard evidence from you under oath.

Background

The background to your case is as follows.

The NMC received a referral on 19 December 2019 from The London North West Healthcare NHS Trust (the Trust). It is alleged that you made fraudulent entries into the controlled drugs register in the bowel cancer screening/private endoscopy unit of St Marks Hospital. [PRIVATE]

You were suspended by the Trust on 12 December 2019, and dismissed on 7 February 2020.

Fitness to practise

Having reached its determination on the facts of this case, and in light of the certificate of conviction the panel proceeded to consider whether your fitness to practise is currently impaired. There is no statutory definition of fitness to practise. However, the NMC has defined fitness to practise as a registrant's suitability to remain on the register unrestricted.

The panel, in reaching its decision, has recognised its statutory duty to protect the public and maintain public confidence in the profession. Further, it bore in mind that there is no burden or standard of proof at this stage and it has therefore exercised its own professional judgement.

Ms Alabaster referred the panel to the relevant pages in the bundle and reminded the panel of the overarching objective of the regulatory process defined in the *Nursing and Midwifery Order 2001, Article 3(4a)*, which states the objectives are:

(a) to protect, promote and maintain the health, safety and wellbeing of the public;

(b) to promote and maintain public confidence in the professions regulated under this Order; and

(c) to promote and maintain proper professional standards and conduct for members of those professions.

Ms Alabaster told the panel that your actions were in breach of fundamental tenets of the NMC code and nursing practice namely:

Prioritising People

Practising Effectively

Persevering safety

Professionalism

[PRIVATE]

You gave evidence and told the panel that as of today, you believe you are able to competently practice as a registered nurse and are not currently impaired. You are

aware that your actions have consequences and you fully regret and feel guilty about your conduct. You told the panel that you have worked as a nurse since 2007 and had a good career. You submitted that after almost two years of reflection, you wish you could have done things differently.

[PRIVATE].

[PRIVATE].

In relation to your fitness to practice today, you submitted that you feel you are able to practice as a nurse and you are willing to accept any consequences arising out of your actions.

Submissions on impairment

Ms Alabaster moved on to the issue of impairment and addressed the panel on the need to have regard to protecting the public and the wider public interest. This included the need to declare and maintain proper standards and maintain public confidence in the profession and in the NMC as a regulatory body. This included reference to the cases of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin) and *General Medical Council v Meadow* [2007] QB 462 (Admin).

Ms Alabaster submitted that the purpose of this process is not to punish a registrant, but to protect members of the public. Ms Alabaster submitted that your actions put patients at risk of harm and if your actions were repeated, you would do so again.

[PRIVATE] She submitted that you let your colleagues down and any patient would be extremely concerned to learn a nurse who has accepted these charges and been convicted is providing care for them.

Ms Alabaster submitted that your actions brought the NMC and the nursing profession into disrepute. She referred to the NMC code and stated that you breached all four

areas of the code which are the fundamental tenets of nursing. She submitted that you put your own interests over the needs of your colleagues and patients, which impacted your colleagues resulting in them taking on your workload.

Ms Alabaster submitted that your actions were dishonest and your behaviour was systematic in that it involved the pre planning of the theft [PRIVATE]. You achieved this by inaccurately completing records and this behaviour went on for some time.

Ms Alabaster referred the panel to the NMC Practice Guidance which addresses remediation, insight and the risk of repetition. She referred the panel to the case of *Ronald Jack Cohen v General Medical Council* [2008] EWHC 581 (Admin), and submitted that this type of conduct is not easily remediable. She submitted that the NMC also have concerns about the underlying attitudinal issues, of someone who disregards patient safety in favour his own needs. [PRIVATE]

Ms Alabaster [PRIVATE] referred the panel to the case of Grant and submitted that any risk of repetition is untenable and the panel may find you impaired in the grounds of public interest as well as public protection.

Ms Alabaster submitted that your conduct is serious and invited the panel to find you currently impaired.

The panel accepted the advice of the legal assessor which included reference to a number of relevant judgments. These included: *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) and Grant* [2011] EWHC 927 (Admin) and *Professional Standards Authority v Health and Care Professions Council and Ghaffer* [2014] EWHC 2723 (admin), *Ronald Jack Cohen v General Medical Council* [2008] EWHC 581 (Admin) and *Professional Standards Authority for Health and Social Care v General Medical Council and Uppal* [2015] EWHC 1304 (Admin).

Decision and reasons on impairment

The panel next went on to decide if as a result of the conviction, your fitness to practise is currently impaired.

Nurses occupy a position of privilege and trust in society and are expected at all times to be professional and to maintain professional boundaries. Patients and their families must be able to trust nurses with their lives and the lives of their loved ones. To justify that trust, nurses must be honest and open and act with integrity. They must make sure that their conduct at all times justifies both their patients' and the public's trust in the profession.

In this regard the panel considered the judgment of Mrs Justice Cox in the case of *CHRE v NMC and Grant* in reaching its decision. In paragraph 74, she said:

'In determining whether a practitioner's fitness to practise is impaired by reason of misconduct, the relevant panel should generally consider not only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances.'

In paragraph 76, Mrs Justice Cox referred to Dame Janet Smith's "test" which reads as follows:

'Do our findings of fact in respect of the doctor's misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her fitness to practise is impaired in the sense that s/he:

- a) *has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm;*
and/or

- b) has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or*

- c) has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or*

- d) has in the past acted dishonestly and/or is liable to act dishonestly in the future.'*

The panel was satisfied that confidence in the nursing profession would be undermined if its regulator did not find charges relating to dishonesty extremely serious.

[PRIVATE] In addition the panel considered that this was inherently dishonest, was in breach of the fundamental tenets of the profession and brought the profession into disrepute.

Regarding insight, the panel considered that your insight was limited in that you have not as yet demonstrated that you understand the impact on your colleagues or the potential impact on patients of your behaviour in addition your understanding of the impact on the wider public interest has not yet fully developed. [PRIVATE]

[PRIVATE]

The panel acknowledged your remorse and regret, but considered that your behaviour falls well below the standard expected of a registered nurse. Although you have been unable to undertake on any specific courses, you did state your partner was a nurse and you have stayed up-to-date by reading nursing journals.

The panel was satisfied that the behaviour in this case could be capable of remediation, although it was conscious that dishonesty is not easily remediable. Therefore, the panel carefully considered the evidence before it in determining whether or not you have remedied your practice. The panel took into account your evidence today and your

limited reflective piece however, the panel is of the view that there is a real risk of repetition based on your lack of insight and remediation. The panel therefore decided that a finding of impairment is necessary on the grounds of public protection.

The panel bore in mind that the overarching objectives of the NMC to protect, promote and maintain the health, safety, and well-being of the public and patients, and to uphold and protect the wider public interest. This includes promoting and maintaining public confidence in the nursing and midwifery professions and upholding the proper professional standards for members of those professions.

The panel concluded that public confidence in the profession would be undermined if a finding of impairment were not made in this case and therefore also finds your fitness to practise impaired on the grounds of public interest.

Having regard to all of the above, the panel was satisfied that your fitness to practise is currently impaired.

The hearing resumed on 17 December 2021

Decision and reasons on service of Notice of Hearing

The panel was informed at the start of the hearing on 17 December 2021 that Mr Andaya was not in attendance and that the Notice of Hearing letter had been sent to Mr Andaya's registered email address on 8 November 2021.

Ms Alabaster, on behalf of the NMC, submitted that it had complied with the requirements of Rule 34 of the Rules.

The panel accepted the advice of the legal assessor.

The panel took into account that the Notice of Hearing provided details of the allegation, the time, dates and venue of the hearing and, amongst other things, information about Mr Andaya's right to attend, be represented and call evidence, as well as the panel's power to proceed in his absence.

In the light of all of the information available, the panel was satisfied that Mr Andaya had been served with the Notice of Hearing in accordance with the requirements of Rule 34.

The panel noted that it previously determined to hold parts of the hearing in private under Rule 19.

Decision and reasons on replacement of the original panel chair

[PRIVATE]

The panel were content that Mr Andaya had provided informed consent for a new chair panel member to hear this case.

Decision and reasons on proceeding in the absence of Mr Andaya

The panel next considered whether it should proceed in the absence of Mr Andaya. It had regard to Rule 21 and heard the submissions of Ms Alabaster who invited the panel to continue in the absence of Mr Andaya. She submitted that Mr Andaya had voluntarily absented himself.

Ms Alabaster referred the panel to email correspondence from Mr Andaya dated 16 December 2021, which confirmed his attendance at the hearing and another email dated 17 December 2021, [PRIVATE]. She informed the panel that a telephone call took place that morning with Mr Andaya, the legal assessor, the panel secretary and herself. [PRIVATE] She submitted that he conveyed that he did not want to adjourn the hearing to another date. She referred the panel to the relevant telephone attendance note of the call.

The panel accepted the advice of the legal assessor.

The panel noted that its discretionary power to proceed in the absence of a registrant under the provisions of Rule 21 is not absolute and is one that should be exercised *'with*

the utmost care and caution' as referred to in the case of *R v Jones (Anthony William)* (No.2) [2002] UKHL 5.

The panel has decided to proceed in the absence of Mr Andaya. In reaching this decision, the panel has considered the submissions of Ms Alabaster and the advice of the legal assessor. It has had particular regard to the factors set out in the decision of *R v Jones* and *General Medical Council v Adeogba* [2016] EWCA Civ 162 and had regard to the overall interests of justice and fairness to all parties. It noted that:

- No application for an adjournment has been made by Mr Andaya;
- Mr Andaya has informed the NMC that he has received the Notice of Hearing and confirmed he is content for the hearing to proceed in his absence;
- There is no reason to suppose that adjourning would secure his attendance at some future date;
- The charges relate to events that occurred in 2019; and
- There is a strong public interest in the expeditious disposal of the case.

There is some disadvantage to Mr Andaya in proceeding in his absence. The limited disadvantage is the consequence of Mr Andaya's decisions to absent himself from the hearing, waive his rights to attend, and/or be represented, and to not provide evidence or make submissions on his own behalf. The panel took into consideration the conversation which took place before the hearing between Mr Andaya, the legal assessor, NMC case presenter and panel secretary. It was of the view that the consequences and seriousness of the hearing proceeding in his absence was very clearly explained to him. The panel noted that alternative methods for his attendance were proposed to him and that the legal assessor had also reminded Mr Andaya of his right to apply for an adjournment. It noted that Mr Andaya remained clear about his position, in that he did not want to attend. The panel [PRIVATE] noted that he was given alternate options of how he could continue his engagement with proceedings and decided not take any of those options.

The panel considered whether to exercise its own powers to adjourn the hearing under Article 32 (2) of the Rules. The panel was of the view that there was no injustice to any party to continue with the hearing today and that there was a public interest in the expeditious disposal of this case. The panel noted that Mr Andaya has positively endorsed that the case continues. The panel determined that there was no reasonable basis to adjourn the hearing today as Mr Andaya had voluntarily absented himself on a fully informed basis.

In these circumstances, the panel has decided that it is fair, appropriate and proportionate to proceed in the absence of Mr Andaya. The panel will draw no adverse inference from Mr Andaya's absence.

Sanction

The panel has considered this case very carefully and has decided to make a striking-off order. It directs the registrar to strike Mr Andaya off the register. The effect of this order is that the NMC register will show that Mr Andaya has been struck-off the register.

In reaching this decision, the panel has had regard to all the evidence that has been adduced in this case and had careful regard to the Sanctions Guidance (SG) published by the NMC. The panel accepted the advice of the legal assessor.

Submissions on sanction

Ms Alabaster informed the panel that in the Notice of Hearing, dated 29 July 2021, the NMC had advised Mr Andaya that it would seek the imposition of a striking off order if it found Mr Andaya's fitness to practise currently impaired.

Ms Alabaster submitted that there was a real risk of harm to patients which had been noted by the Crown Court Judge in the sentencing remarks as well by the panel in its determination of Mr Andaya's current impairment. Further, she submitted that the patients who were put at risk in Mr Andaya's care were very vulnerable and wholly reliant on the care provided. She reminded the panel of the pressures that Mr Andaya's

colleagues felt as a result of his unfitness at work, as recorded in their witness statements.

Ms Alabaster reminded the panel that Mr Andaya's behaviour continued until he was caught, and drew the panel's attention to its own finding that there remained a risk of repetition. She took the panel through the sanctions available. She submitted that this conduct was at the serious end of the fitness to practise spectrum and its seriousness would not be addressed by taking no further action, or imposing a caution order or a conditions of practice order. She noted that Mr Andaya had provided no further information since the last hearing.

Ms Alabaster asked the panel to consider whether Mr Andaya's behaviour was fundamentally incompatible with remaining on the register and invited the panel to make such a finding given the seriousness of the charges admitted in this case. She referred the panel to relevant NMC guidance and reminded the panel that it is dealing with a dishonesty conviction. She submitted that if the panel finds that Mr Andaya's behaviour is fundamentally incompatible with remaining on the NMC register, it should remove him from the register permanently. She submitted that members of the public would be horrified to learn about the conduct admitted in this case.

Decision and reasons on sanction

Having found Mr Andaya's fitness to practise currently impaired, the panel went on to consider what sanction, if any, it should impose in this case. The panel has borne in mind that any sanction imposed must be appropriate and proportionate and, although not intended to be punitive in its effect, may have such consequences. The panel had careful regard to the SG. The decision on sanction is a matter for the panel independently exercising its own judgement.

The panel took into account the following aggravating features:

- Mr Andaya's conduct put patients at risk of harm.

- The repeated pattern of behaviour in which Mr Andaya demonstrated persistent acts of known dishonesty, in 31 instances over seven weeks, until his behaviour was discovered.
- Mr Andaya's premeditated behaviour in relation to the incidents which took place.
- Mr Andaya abused the trust placed in him as a nurse for his own personal gain.
- Mr Andaya dishonestly falsified patient records by indicating that patients had been administered controlled medications when they had not.
- [PRIVATE]
- Mr Andaya's apparent minimisation of the seriousness of the incidents raised attitudinal concerns.
- Patients who were in Mr Andaya's care were particularly vulnerable when these incidents took place.
- The sentencing remarks of Judge in the criminal proceedings at Harrow Crown Court
- Mr Andaya has been convicted of a criminal offence that meets the seriousness threshold for a custodial sentence.

The panel also took into account the following mitigating features:

- [PRIVATE]
- Developing insight and remorse as illustrated by Mr Andaya's reflective piece dated 5 August 2021.

The panel noted that Mr Andaya remains under a suspended custodial sentence until 7 October 2022. The panel considered the case of *The Council for the Regulation of Health Care Professionals v General Dental Council and Fleischmann* [2005] EWHC 87 (Admin) and it was of the view that there are no exceptional grounds in this case to disregard the approach outlined where a registrant should not care for patients whilst serving a criminal sentence. This meant that the panel found that to take no action, to impose a caution, or to make a conditions of practice order would not be appropriate in this case.

The panel then went on to consider whether a suspension order would be an appropriate sanction and had regard to the SG in this respect.

Mr Andaya's conviction and the events that lay behind it represented a significant departure from the standards expected of a registered nurse.

In this particular case, the panel determined that a suspension order would not be a sufficient, appropriate or proportionate sanction to address the extremely serious misconduct identified. The panel found that the serious breach of the fundamental tenets of the profession evidenced by Mr Andaya's actions is fundamentally incompatible with Mr Andaya remaining on the register.

Finally, in looking at a striking-off order, the panel took note of the following paragraphs of the SG:

- *Do the regulatory concerns about the nurse or midwife raise fundamental questions about their professionalism?*
- *Can public confidence in nurses and midwives be maintained if the nurse or midwife is not removed from the register?*
- *Is striking-off the only sanction which will be sufficient to protect patients, members of the public, or maintain professional standards?*

[PRIVATE] The panel noted Mr Andaya's abuse of his nursing position and that his behaviour repeatedly put patients at risk. The panel was of the view that Mr Andaya did not grasp the seriousness of his actions which put patients at risk of harm or the impact on his colleagues. It was of the view that it had no information that his insight had developed any further from the last hearing on 27 August 2021. The panel was of the view that the findings in this particular case demonstrate that Mr Andaya's actions were serious and that to allow him to continue practising would undermine public confidence in the profession and in the NMC as a regulatory body.

Balancing all of these factors and after taking into account all the evidence before it during this case, the panel determined that the appropriate and proportionate sanction

is that of a striking-off order. Having regard to the effect of Mr Andaya's actions in bringing the profession into disrepute by adversely affecting the public's view of how a registered nurse should conduct himself, the panel has concluded that nothing short of a striking off order would be sufficient in this case.

The panel considered that this order was necessary to mark the importance of maintaining public confidence in the profession, and to send to the public and the profession a clear message about the standard of behaviour required of a registered nurse.

This will be confirmed to Mr Andaya in writing.

Interim order

As the striking-off order cannot take effect until the end of the 28-day appeal period, the panel has considered whether an interim order is required in the specific circumstances of this case. It may only make an interim order if it is satisfied that it is necessary for the protection of the public, is otherwise in the public interest or in Mr Andaya's own interest until the striking-off sanction takes effect. The panel heard and accepted the advice of the legal assessor.

Submissions on interim order

The panel took account of the submissions made by Ms Alabaster. She submitted that an interim order will cover the period of appeal before the substantive striking order comes into effect. Further, she submitted that an interim suspension order for a period of 18 months is necessary for public protection for the reasons already outlined. She submitted that as Mr Anadaya is to be removed from the register, this application is consistent with the panel's sanction of a striking off order. She noted that the interim order will fall away once the substantive order comes into effect.

Decision and reasons on interim order

The panel was satisfied that an interim order is necessary for the protection of the public and is otherwise in the public interest. The panel had regard to the seriousness of the facts found proved and the reasons set out in its decision for the substantive order in reaching the decision to impose an interim order.

The panel concluded that an interim conditions of practice order would not be appropriate or proportionate in this case, due to the reasons already identified in the panel's determination for imposing the substantive order. The panel therefore imposed an interim suspension order for a period of 18 months to cover the period of appeal.

If no appeal is made, then the interim suspension order will be replaced by the striking off order 28 days after Mr Andaya is sent the decision of this hearing in writing.

That concludes this determination.